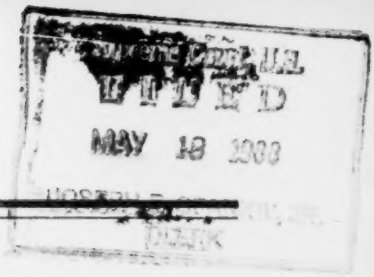
Nos. 87-1514 and 87-1719



IN THE

Supreme Court of the United States

October Term, 1987

ARMCO, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD

UNITED STEELWORKERS OF AMERICA, AFL-CIO
AND ITS LOCAL 1865, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD

Donald J. Mares
LAW OFFICES OF
McKENDREE, TOLL & MARES
1244 Grant Street
Denver, Colorado 80203
(303) 861-8906

Of Counsel:
John W. McKendree, General Counsel
Oil, Chemical and Atomic Workers
International Union, AFL-CIO
P.O. Box 2812
Denver, Colorado 80201
(303) 987-2229

(Attorneys for OCAWIU)

QUESTIONS PRESENTED

1. Was the National Labor Relations Board ("N.L.R.B.", "Board") decision that the coke plant employees comprised a bargaining unit separate and distinct from the steel mill workers arbitrary and capricious?
2. Was the above-mentioned decision an abuse of discretion by the N.L.R.B.?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTE:

IN THE

Supreme Court of the United States

October Term, 1987

Nos. 87-1514 and 87-1719

ARMCO, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD

UNITED STEELWORKERS OF AMERICA, AFL-CIO AND ITS LOCAL 1865, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD

BRIEF OF THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 832 F.2d 357. Copies of the Opinion of the National Labor Relations Board (279 N.L.R.B. No. 143, May 30, 1986) and the Opinion of the Administrative Law Judge, have been lodged with the Clerk of this Court by way of a joint Supplemental Appendix filed by both Petitioners.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1987. Petitions for Rehearing were denied on February 4, 1988. A Petition for Extension of Time to Respond

to the Petitions for Writ of Certiorari was filed both by the N.L.R.B. and the OCAW with this Court and an extension until May 19, 1988 was granted. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Allied Chemical Corporation was engaged in the production of coke and its by-products for 35 years in the Ashland, Kentucky area. From 1952 through 1981, its workers were represented by the Oil, Chemical and Atomic workers International Union, Local 3-523.[1]

Armco owns a steel mill in Ashland, Kentucky, and its 3700 workers are represented by the United Steelworkers of America ("USWA", "Steelworkers"). Although both facilities are located in Ashland, Kentucky, there is a distance of several miles between the two plants.

The two companies transacted business with each other, with Armco purchasing approximately 500 tons of coke per day from Allied, a total which represented almost all of Allied's daily production. Because the coke plant had a daily output capacity of 2800 tons, most of its approximately 400 workers were on layoff status during 1981. Allied desired to get out of the coke industry, therefore, it entered into negotiations with Armco for the sale for the Ashland coke facility. The sales was consummated on December 31, 1981, with Armco buying the coke plant for a price of $100,000,000.

In the steel industry, some, but certainly not all, manufacturers also own coke plants adjacent to or near their blast furnaces. The coke facility here is located several miles from the blast furnaces. Coke facilities require a work force that has specialized skills which are different from those possessed by

---

[1] The Unions representation ended on 12/31/81 even though it had a collective bargaining agreement with Allied effective through May 14, 1982. The termination of this representation will be discussed below.

steel mill employees. So, although Armco had several hundred workers on layoff status at the steel mill, it wished to retain Allied's competent, stable, well-trained and highly skilled workforce because of the economic and practical benefits that such a move would bestow upon Armco's operations.

During negotiations, Armco told Allied that it would hire the entire workforce from the coke plant and would recall laid-off coke plant workers in accordance with their rights under the OCAW contract. Armco would refuse, however, to either recognize or negotiate with OCAW as bargaining agent for these workers, stating that it wished to bring the workers in under the Steelworkers' contract.

Talks were held between OCAW and USWA about this representational issue. Since both OCAW and USWA are members of the AFL-CIO, OCAW President Robert Goss sought a cooperative effort between the Unions to determine whether they could agree on a plan that would be in the coke plant workers best interest; a plan in which Armco would hire these workers with seniority, pensions, and other benefits intact. If this arrangement could be made and if OCAW Local 3-523's members agreed to USWA representation, Goss said he would consider releasing them subject to OCAW internal procedures for transferring jurisdiction to another international union. The statement by Goss that OCAW would consider releasing its members by no means meant that such release was either approved or imminent. None of the conditions mentioned by Goss was ever met.

Armco and USWA began to negotiate on December 2, 1981 on an agreement that would cover the coke plant employees. These negotiations produced an agreement which assigned the coke plant employees a seniority date of December 31, 1981 for purposes of plant-wide job rights.[2] The agreement effectively

---

[2] The coke plant employees retained their Allied seniority for purposes of relative seniority within their own group, that is, for vacation and shift assignments. In that respect, nothing changed in their working conditions after the takeover.

prohibited any exchange of jobs between steel mill and coke plant employees. Thus, the coke plant employees became an entirely separate group not only because of a different community of interests but also because of a physical separation. No OCAW representative was invited to participate in the negotiations that led to the Armco-Steelworkers Agreement.

Because none of its objectives had been met in the Armco-Steelworkers Agreement, OCAW emphatically declined to sign the Memorandum of Understanding reached by Armco and the Steelworkers when the USWA presented it to OCAW. President Goss sought the assistance of the Steelworker's International President Lloyd McBride but when that assistance was not forthcoming, friendly communications between the two unions ended.

OCAW was advised by both Allied and Armco that it would be unwise to assert OCAW's bargaining rights, that Allied might shut the plant down instead of selling it to Armco and that the Armco-Steelworkers Agreement was "the only show in town" if the coke plant workers were to keep their jobs.

On December 19, Armco, Allied, and OCAW's local representatives met. Armco Official Ed Maddox explained terms of the transfer, which included a guarantee of jobs for the present workforce and eventual recall of laid-off workers. "That is," said Maddox, "unless someone gives us a reason not to." OCAW understood that the "reason not to" would be OCAW's insistence on continuing as the coke plant's bargaining representative. The ALJ, the Board, and the Sixth Circuit found that further OCAW demands would have been futile and the OCAW reasonably feared its members would have been futile and that OCAW reasonably feared its members would lose their jobs if the Union insisted on its legal prerogatives.

Armco took over the coke facility on December 31, 1981. At an indoctrination meeting for its employees on January 2, 1982, the coke plant employees were given membership applications and dues check-off authorization cards for the USWA

and were required to sign these as conditions of employment.[3] Although both President Goss and OCAW Local Representative Kenneth McKeand initially objected to this requirement, they eventually told the coke workers to sign the cards rather than risk losing their jobs. At no time, however, did OCAW unconditionally release the employees to the Steelworkers, and at no time did the workers vote to be represented by the Steelworkers.

The OCAW thereafter sought to maintain its jurisdiction over the coke plant workers. After consulting with its legal staff, the OCAW decided to pursue litigation instead of filing charges pursuant to Article XX of the AFL-CIO Constitution. This litigation has exhausted all administrative procedures at the N.L.R.B. and progressed to the U.S. Court of Appeals for the Sixth Circuit, where the Court upheld N.L.R.B. findings favorable to OCAW. The OCAW has pursued this course of action vigorously and at no time has the Union waived its right to act as bargaining agent for the coke plant employees.

REASONS TO DENY THE WRIT

I. THE DETERMINATION THAT MULTIPLE BARGAINING UNITS ARE NECESSARY FOR A SINGLE EMPLOYER DOES NOT CONFLICT WITH THE PRECEDENT ESTABLISHED BY THE N.L.R.B. THE BOARD HAS APPROVED SEPARATE BARGAINING UNITS

---

[3] Armco's Ed Maddox admitted that he had given an Affidavit to the National Labor Relations Board stating that signing the cards was required (Tr. 94). Several employees testified that questions were raised by the employees about the cards at several orientation meetings, and that the Company's uniform response was, "if you work for Armco, you have to sign the card." (Tr. 378; 131; 134; 377; 1033). Moreover, every employee did sign. (Tr. 94). As Darrell Clay testified, "I needed the job, and my understanding was that that was the only way that I could be hired - was to sign the card." (Tr. 165).

IN HIGHLY INTEGRATED INDUSTRIES IN THE PAST.

The Board has carved out separate bargaining units in highly integrated manufacturing processes in the past. This determination ws approved by the court of appeals in *N.L.R.B. v. Metal Container Corp.*, 660 F.2d 1309 (8th Cir. 1981). The court held that a separate bargaining unit for four electricians was appropriate despite the highly integrated nature of the Company's two-piece can manufacturing process. Although there were a total of 110 manufacturing employees in the plant, the court held that the four electricians had a community of interests that was separate and district from that of the other workers. Past industry practice was also found irrelevant in that determination. Seventy-one out of seventy-two plants that were previously organized in that industry had "wall-to-wall" bargaining units. Nevertheless, the Board and the court found that the controlling factor was whether or not the workers had a similar community of interest.

The Board also found that separate bargaining units were appropriate, a decision affirmed in *Hamilton Test Systems v. N.L.R.B.*, 743 F.2d 136 (2nd Cir. 1984), despite an outcry from the company that this would subject it to piecemeal unionization. Community of interests was once again the overriding factor in the Board's decision. In the present case, the Board found that the coke workers are involved in a different operation than the steel mill workers. The Sixth Circuit upheld this determination. Even the Steelworkers admit that the coke industry and the steel industry are, in fact, different industries.[4]

The two cases cited by Petitioner, concerning single bargaining units for workers in a highly integrated industry, are factually distinct from the present case. *Continental Webb Press, Inc. v. N.L.R.B.*, 742 F.2d 1087 (7th Cir. 1984), involved pressmen

---

[4] Steelworkers Petition for Certiorari, Questions Presented, Question 2, last line, p. i.

and preparatory employees that performed many of the same duties and had a high degree of interaction. The workers in *N.L.R.B. v. Harry T. Campbell Sons' Corp.*, 407 F.2d 969 (4th Cir. 1969), had a higher degree of interaction than in the current case, performed some of the same tasks and worked in buildings and quarries that were located next to one another on the company's compound.

The case at hand differs from both of those mentioned above because there is geographical distance between the two plants, different skills are involved and the coke workers face different hazards than the steel mill workers do. In short, the Board found based upon the facts of the case at bar that the coke facility workers had a different community of interests than that workers at the steel mill.

The Sixth Circuit upheld the Board's ruling because it was not arbitrary and capricious and there was no abuse of discretion since the decision was based on substantial evidence in the record. The present situation is simply much different than the facts presented in either *Harry T. Campbell* or *Continental Webb Press.* The Board saw this and made a decision that was justified and well within its discretion. *See, also, South Prairie Construction Co. v. Local 627, International Union of Operating Engineers,* 425 U.S. 800 (1976) (the Court made it clear that the Board's decision concerning the selecton of an appropriate bargaining unit lies within the Board's discretion and should be given deference). Since the facts of the case at bar differ from those of the cases cited by Petitioners, no actual conflict among the circuit courts exists. Each circuit has applied the same principles of law, only to differing sets of facts. Thus, granting the Writ requested would be inappropriate.

Although functional integration of an operation is one factor to be considered in determining the appropriate bargaining unit, it is not the sole factor. Among other factors to consider are geographical proximity, degree of interchange among employees of different departments, similarity of working

conditions, skills and functions, and collective bargaining history.[5]

The court in *N.L.R.B. v. Indianapolis Mack Sales and Service, Inc.*, 802 F.2d 280 (7th Cir. 1986), cited by Petitioners, themselves, held that the Board erred when it considered only one of the factors - past bargaining history - in making a determination about an appropriate bargaining unit. Similarly, integration of the manufacturing process is only one of the factors to be considered. The ALJ and the Board, however, examined the integration of operations as well as the degree of interchange among employees, geographical proximity between the two plants, similarity of working conditions, differing skills and functions required of the workers in the two facilities, centralized administrative control and past bargaining history and determined that the coke plant workers were an appropriate bargaining unit and had not been accreted into Armco's existing facility. Petitioners' Supplemental Appendix (P.S.A.) pp. 120-122. The Sixth Circuit in upholding the Board's decision stated that there had been no abuse of discretion by the N.L.R.B. and that its decision was based on substantial evidence on the record. Absent an arbitrary and capricious decision where there is no substantial evidence on the record, the Board's decision should be granted deference based on its broad experience in these matters. *See, e.g. Beth Israel Hospital v. N.L.R.B.*, 688 F.2d 697 (10th Cir. 1982), *cert. denied,* 459 U.S. 1025 (1982).

Although the Board may have found accretion in some of the other steel mill cases that it has heard, it has broad discretion in defining bargaining units and this Court has recognized the need for flexibility in individual cases. *N.L.R.B. v. Hearst Publications,* 322 U.S. 111 (1944). This Court has opined that

---

[5] *See, N.L.R.B. v. Foodland, Inc.*, 744 F.2d 735 (10th Cir. 1984), *E. I. DuPont de Nemours & Co.*, 162 N.L.R.B. 413 (1966), *Atlantic Richfield Co.*,231 N.L.R.B. 31 (1977); *Matlack, Inc.* 278 N.L.R.B. No. 36 (1986).

" . . . the selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision 'if not final, is rarely to be disturbed.' " *South Prairie Construction Company v. Local 627, International Union of Operating Engineers,* 425 U.S. 800, 805 (1976), citing, *Packard Motor Company v. N.L.R.B.,* 330 U.S. 485 (1947).

The Sixth Circuit found no abuse of discretion by the Board and the decision was based on substantial evidence in the record. Absent findings that the decision was arbitary and capricious, the decision below should stand and this case should not be reviewed.

II. THE BOARD AND THE COURT OF APPEALS CONSIDERED A NUMBER OF FACTORS IN MAKING THEIR DETERMINATION THAT THE COKE PLANT WORKERS COMPRISE AN APPROPRIATE BARGAINING UNIT. THIS DECISION IS NOT IN CONFLICT WITH THAT OF THE SEVENTH CIRCUIT.

Although the court of appeals does say that past bargaining history alone is suggestive of a separate bargaining unit, it discusses other factors comprising community of interest and gives weight to them. The court considered the similarly of skills, lack of employee interaction and integration of the manufacturing process in its discussion. the Petitioners suggest that the court did not give adequate consideration to the integration of the process. However, the court did consider the issue and agree with the Board that the process was not highly integrated. *Armco, Inc. v. N.L.R.B., supra,* pp. 363-364.

The process of producing coke was separate from that of producing steel and some of the coke was indeed stockpiled for future use. P.S.A., pp. 119-120. The continuous process does not begin at the coke facility but rather at the blast furnace. *Id.,* p. 120. The Administrative Law Judge found that the coke facility was nothing more than a supplier to the steel mill.

Id. Based on factors that it has used many times in the past, the Board made a decision about the appropriate bargaining unit that was consistent with rulings it had made previously. The Sixth Circuit applied the appropriate standard of judicial review and upheld the Board's decision. There is no need for further review. Since the case at bar differs from the cases cited by Petitioners, no actual conflict among the circuit courts exists. Each Circuit has applied the same principles of law, only to differing sets of factors. Thus, granting the Writ requested would be inappropriate.

In *N.L.R.B. v. Indianapolis Mack Sales, supra,* the court held that the Board should not consider past bargaining history alone; rather, the Board should consider a wide range of factors that comprise the community of interests. The ALJ, the Board and the Court of Appeals in this matter considered these factors in rendering their decisions. This is consistent with the holding in *Indianapolis Mack Sales, supra,* p. 363. Thus, there is no conflict between circuit courts which this Court must clear up.

III. ECONOMIC FACTORS, WHILE DUE SOME CONSIDERATION, ARE NOT THE SOLE DETERMINANT OF THE APPROPRIATE BARGAINING UNIT.

The court below recognized that there were some changed economic circumstances after Armco purchased the coke facility in that, primarily, production had increased and Armco now had a greater number of employees. *Armco, Inc. v. N.L.R.B., supra.* The coke plant and the steel mill may have a united economic mission because they are both part of the same company and, generally, if the corporation flourishes, its distinct parts will also benefit. Interest in seeing the corporation show a profit, however, does not equate to workers having the same community of interests in their individual segments of the corporation. Workers in different parts of the corporation have different skills and face different working conditions.

In examining the components of "community of interests", the Board found that the coke facility workers face environmental hazards differing from those faced by steel mill workers and that the skills needed for job performance were different for the respective groups. P.S.A., pp. 117-121. The Board held that separate bargaining units were necessary to address these concerns. The Board's decision recognizes that workers in different departments of the same corporation can and do have different skills and face different obstacles in their effort to assist in keeping a company economically viable. The Sixth Circuit upheld this ruling finding that the decision was based on substantial evidence on the record and that there was no abuse of discretion. Since there was no abuse of discretion, the Board's decision should not be changed. *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers, supra.*

In *N.L.R.B. v. Burns International Security Services,* 406 U.S. 272 (1972), this Court found that, holding the union or the new employer to the substantive terms of an old collective bargaining agreement may be inequitable, and that, unless certain changes were made in the old agreement, investment in moribund industries may be discouraged. The Court goes on to say:

> Saddling such an employer with the terms and conditions of employment contained in the old collective bargaining contract may make these changes impossible and may discourage the inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it should be unwilling to make to a large or economically successful firm. The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties.

Id., at 288. This passage indicates that both parties to a collective bargaining agreement will be affected by economic realities and marketplace fluctuations when they enter into an employee-employer relationship and that their subsequent negotiations will be affected by these conditions.

This Court's decision in *Howard Johnson Co. v. Detroit Local Joint Executive Board,* 417 U.S. 249 (1974), stands for the proposition that a successorship clause in a collective bargaining agreement cannot bind the successor where it is clear that the buyer refused to assume any obligations under the agreement. Armco has assumed all responsibilities under the old collective bargaining agreement except for the duty to bargain with OCAW. This notwithstanding, the Board found that Armco was a successor to Allied. Armco knew about its responsibilities in regard to the new plant and the new workers that were joining the corporation.

While Armco knew of its new responsibilities, it could not know with certainty what economic effect these new conditions would have on its operation. Armco knew there was a union involved and that there would be give and take in negotiations and that nothing was guaranteed. Likewise, the domestic steel market for the past few years has been sluggish at best. Armco knew that the economic "deal" it was getting by purchasing the coke facility was somewhat speculative given current market conditions.

Given the different concerns and community of interests that the workers in the coke plant had, including the long history of OCAW representation, and that coke production and steel manufacturing are, as even Armco admits,[6] different industries, the Company should have foreseen that possibly the future would not proceed according to its optimal economic plan. Armco's speculative financial strategy did not turn out as

---

[6] Armco Petition for Writ of Certiorari, p. 15.

favorable as projected. Changing economic and market conditions are part of the risks that all businesses take; they are not, however, sufficient reason to overturn a legitimate decision made by the Board. This Court should not grant the Writ since there has been no abuse of discretion.

IV. THE ISSUE PRESENTED TO THIS COURT BY PETITIONERS IS NOT PROPERLY BEFORE THE COURT BECAUSE IT IS OF ROUTINE CHARACTER AND HAS BEEN PROPERLY RULED ON BY THE N.L.R.B. AND THE COURT OF APPEALS ACCORDING TO WELL-ESTABLISHED PROCEDURES.

The N.L.R.B. has issued an untold number of decisions concerning the appropriateness of a bargaining unit, using established guidelines to determine whether a similar community of interests for a group of workers exists. The ALJ and the Board used the same criteria in this case and determined that the coke plan workers comprised an appropriate bargaining unit, one that is separate from the steel mill workers.

The courts have dealt with the question of arbitary and capricious decisions and abuse of discretion by administrative agencies on many, many occasions. This Court has ruled that an agency decision is arbitrary and capricious if the agency has relied on factors which congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *See, Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Company,* 463 U.S. 29 (1983). The Court of Appeals for the Sixth Circuit decided that, given the evidence of this case, the Board's decision was not arbitrary and

capricious and was based on substantial evidence on the record. There was no abuse of discretion.

The N.L.R.B. used the same guidelines in this case as it has used for all of the bargaining unit determination cases it has heard in the past. The Sixth Circuit did likewise when it reviewed the Board's decision. This is not a case where new law is to be made or where either the Board or the Court of Appeals has acted contrary to any previous decision issued by this Court. Nor does this Court have to clear up any confusion or conflict about what the current state of the law is. There is no reason why this Honorable Court should review this case. The Board's ruling and the Court of Appeals decision upholding this ruling should stand.

CONCLUSION

This case involves a routine administrative decision and review of that decision. The N.L.R.B. acted well within its jurisdiction and discretion when it determined that the coke plant workers had a distinct community of interests and were entitled to be a separate bargaining unit. The Court of Appeals for the Sixth Circuit found that the ALJ and Board considered a wide range of factors in making the determination and all decisions were based on substantial evidence on the record. As mentioned above, the Sixth Circuit's decision is consistent with that of the Seventh Circuit in *N.L.R.B. v. Indianapolis Mack Sales and Services, supra.* There is no conflict among the Circuit Courts, nor did either the Board or the Court of Appeals act contrary to any previous decisions issued by this Court. There is no new law to be made in this case. The Petition for Writ of Certiorari should be denied.

Respectfully submitted:

LAW OFFICES OF
McKENDREE, TOLL & MARES

By: _____
Donald J. Mares
1244 Grant Street
Denver, Colorado 80203
(303) 861-8906

Of Counsel:

By: _____
John W. McKendree, General Counsel
Oil, Chemical and Atomic Workers
International Union, AFL-CIO
P.O. Box 2812
Denver, Colorado 80201
(303) 987-2229

(Attorneys for OCAWIU)